STATE OF MICHIGAN

COURT OF APPEALS

COALITION FOR A SAFER DETROIT, Plaintiff-Appellant,	FOR PUBLICATION February 9, 2012
v	No. 300516 Wayne Circuit Court
DETROIT CITY CLERK and DETROIT ELECTION COMMISSION, Defendants-Appellees.	LC No. 10-009328-AW Advance Sheets Version

Before: MARKEY, P.J., and SAAD and GLEICHER, JJ.

MARKEY, P.J. (*dissenting*).

I respectfully dissent. It is plaintiff that seeks judicial interference with the political legislative process. I agree with the trial court that plaintiff failed to meet its burden of proof to establish that defendants had a clear legal duty to certify a ballot question to adopt a city ordinance that is clearly contrary to state law. For this reason, I would affirm.

The issuance of a writ of mandamus is an extraordinary remedy, and whether it issues is within the discretion of the court. *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 284; 761 NW2d 210 (2008); *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 438; 722 NW2d 243 (2006). "The plaintiff bears the burden of demonstrating entitlement to the extraordinary remedy of a writ of mandamus." *Citizens for Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 492; 688 NW2d 538 (2004). The party seeking a writ of mandamus must establish that it (1) "has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result." *Citizens Protecting Michigan's Constitution*, 280 Mich App at 284. The discretionary writ of mandamus "cannot be invoked to accomplish [an] illegal purpose, even though the officer against whom it is invoked is charged with an express duty under [a] statute." *Cheboygan Co Bd of Supervisors v Mentor Twp Supervisor*, 94 Mich 386, 388; 54 NW 169 (1892).

The majority reasons that defendants may not review the substance of the ballot initiative to ensure its compliance with state law but must, instead, after verifying the sufficiency of the requisite signatures and the failure of the city council to adopt the initiative, perform the ministerial act of placing the proposal on the ballot. The majority also applies the doctrine of ripeness, announced in *Hamilton v Secretary of State*, 212 Mich 31; 179 NW 553 (1920), and

followed in subsequent cases, to conclude "that a substantive challenge to a proposed initiative is improper until *after* the law is enacted." *Ante* at 6. I disagree.

Since *Marbury v Madison*, 5 US (1 Cranch) 137, 177; 2 L Ed 60 (1803), it has been the province of the judiciary in the United States to "to say what the law is." Thus, under our system of government with three coequal branches, "interpreting the law has been one of the defining aspects of judicial power." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 98; 754 NW2d 259 (2008). Yet all public officers in this state from each branch of government must take the same oath. Const 1963, art 11, § 1 provides in part:

> All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of . . . . . according to the best of my ability.

The oath emphasizes that apart from the United States Constitution, the Michigan Constitution is the supreme law that must guide "legislative, executive and judicial" officers to "faithfully discharge the duties of [their] office."

The supremacy of Michigan's Constitution in matters relating to the right of initiative was recently recognized by this Court in *Citizens Protecting Michigan's Constitution*, 280 Mich App 273. The issue presented in that case was whether an initiative petition filed pursuant to Const 1963, art 12, § 2, to amend the Michigan Constitution in a multitude of ways could be placed on the ballot or whether the proposed amendments were so multifarious as to constitute a "general revision" and required compliance with the procedures for a constitutional convention, Const 1963, art 12, § 3. This Court held that the latter constitutional provision applied and issued a writ of mandamus precluding defendants from submitting the initiative petition to the electors. *Citizens Protecting Michigan's Constitution*, 280 Mich App at 277, 308. Relying on several Michigan Supreme Court cases, including *Michigan United Conservation Clubs v Secretary of State* (*After Remand*), 464 Mich 359, 365-366; 630 NW2d 297 (2001), *Michigan United Conservation Clubs v Secretary of State*, 463 Mich 1009; 625 NW2d 377 (2001), *City of Jackson v Comm'r of Revenue*, 316 Mich 694, 711; 26 NW2d 569 (1947), and *Scott v Secretary of State*, 202 Mich 629, 643; 168 NW 709 (1918), this Court concluded that whether an initiative proposal meets Michigan's constitutional prerequisites for submission to the electors presents a "threshold determination" that is ripe for decision before the initiative proposal is submitted to the voters. *Citizens Protecting Michigan's Constitution*, 280 Mich App at 282-291. An initiative "petition will not meet the constitutional prerequisites for acceptance if the constitutional power of initiative does not extend to the proposal at issue." *Id*. at 291.

The rights of initiative and referendum are reserved to the people by Const 1963, art 2, § 9, which states, in pertinent part with respect to this case:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. *The power of initiative extends*

> *only to laws which the legislature may enact under this constitution.* [Emphasis added.]

In my opinion, the emphasized sentence imposes a substantive limit on the right of initiative.[1] Moreover, consideration must be given to the fact that the initiative petition at issue in this case proposes to amend a Detroit ordinance. Cities and other municipalities of this state are creatures of this state's sovereignty and possess only the power and authority granted by the Michigan Constitution and state statutes. *Sinas v City of Lansing*, 382 Mich 407, 411; 170 NW2d 23 (1969). Consequently, another constitutional provision limits the adoption of ordinances by Detroit's legislative body. Specifically, Const 1963, art 7, § 22 provides that a city or village "shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law." In *People v Llewellyn*, 401 Mich 314, 322; 257 NW2d 902 (1977), our Supreme Court provided clear guidance on the limits Const 1963, art 7, § 22 imposes on the authority of a city legislature to adopt ordinances that conflict with state law. "Under Const 1963, art 7, § 22, a Michigan municipality's power to adopt resolutions and ordinances relating to municipal concerns is "'subject to the constitution and law.'" *Llewellyn*, 401 Mich at 321. Moreover,

> [a] municipality is precluded from enacting an ordinance if 1) the ordinance is in direct conflict with the state statutory scheme, or 2) if the state statutory scheme pre-empts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation. [*Id*. at 322.]

A direct conflict exists when an ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits. *Id.* at 322 n 4.

Except within the strict confines of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., the use and possession of marijuana is prohibited by Michigan's Public Health Code, MCL 333.1101 *et seq*. See MCL 333.7404(2)(d) (prohibiting use of marijuana); MCL 333.7403(2)(d) (prohibiting possession of marijuana); and MCL 333.7401(1) and (2)(d) (prohibiting the manufacture, creation, delivery, or possession with intent to manufacture, create,

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[1] For the reasons discussed in this opinion, I disagree with this Court's decision in *Ferency v Bd of State Canvassers*, 198 Mich App 271; 497 NW2d 233 (1993), which held that the substantive limitation of Const 1963, art 2, § 9 was not ripe for review before an election is held. *Ferency*, 198 Mich App at 274, held that whether an initiative petition was subject to preelection review under Const 1963, art 2, § 9 was controlled by *Hamilton*, 212 Mich 31. But *Hamilton* interpreted Const 1908, art 17, § 2, regarding amending the constitution, which did not contain the substantive limit contained in Const 1963, art 2, § 9. See *Hamilton*, 212 Mich at 35-36; cf. Const 1908, art 5, § 1 and *Auto Club of Mich Comm for Lower Rates Now v Secretary of State (On Remand)*, 195 Mich App 613, 616-619; 491 NW2d 269 (1992). *Ferency* also held that the authority to engage in constitutional review "lies solely with the judiciary." *Ferency*, 198 Mich App at 273-274. Even if this is so, judicial review in the grand tradition of *Marbury v Madison* is occurring now. See *Citizens Protecting Michigan's Constitution*, 280 Mich App at 291.

or deliver marijuana). Thus, because the proposed ordinance would permit "the use or possession of less than 1 ounce of marihuana, on private property, by a person who has attained the age of 21 years," without compliance with the MMMA, there is a patent, direct conflict between the proposed ordinance and state statute. *Llewellyn*, 401 Mich at 322 n 4. The proposed ordinance would be preempted by state statute if passed by the voters, and it is not within its constitutional authority under Const 1963, art 7, § 22 for the Detroit legislative body to adopt this ordinance. *Llewellyn*, 401 Mich at 319-320. Consequently, the initiative petition here does not satisfy the constitutional prerequisite of coming within the right of initiative under Const 1963, art 2, § 9. *Citizens Protecting Michigan's Constitution*, 280 Mich App at 291.

The majority opines that "the question of a potential conflict between city and state law is complex, particularly when the language of the proposed ordinance does not appear to invalidate or interfere with the enforcement of state and federal laws prohibiting the use or possession of marijuana." *Ante* at 6. While I agree that a local ordinance cannot "invalidate or interfere with the enforcement of state and federal laws," this is not the test announced in *Llewellyn* to determine whether a city or village exceeds its authority under Const 1963, art 7, § 22. Applying the correct test, I conclude, as did the trial court, that the initiative proposal here sought the adoption of an ordinance that directly conflicted with state law. Consequently, it was not within the constitutional authority of the city of Detroit to adopt such an ordinance. *Id.*; see also *Llewellyn*, 401 Mich at 321-322, n 4. As such, the proposed ordinance amendment was not within the reserved right of initiative provided for in Const 1963, art 2, § 9. See *Citizens Protecting Michigan's Constitution*, 280 Mich App at 291.

Finally, as noted initially, it is the plaintiff's burden to establish not only that it has a clear legal right to performance of the specific duty sought, but also that the defendant has the clear legal duty to perform the act requested. *Id*. at 284. Plaintiff in this case failed to meet its burden of proof with respect to either of these requirements. I would hold that the trial court did not abuse its discretion by denying plaintiff's complaint for a writ of mandamus to compel the placing of this initiative before the electors because its purpose—and admittedly so—was to adopt an amendment to Detroit's ordinances that clearly conflicted with state law and, thus, sought to accomplish an illegal purpose. *Cheboygan Co Bd of Supervisors*, 94 Mich at 388.

I would affirm.

/s/ Jane E. Markey